Supreme Court, U.S.
FILED

No. 03 353 AUG 29 2003

IN THE

Supreme Court of the United States

LON C. SAUER, Individually, and as Administrator of the Estate of MARGARETHA SAUER,

Cross-Petitioner,

v.

ADVOCAT, INC., DIVERSICARE LEASING CORPORATION, d/b/a RICH MOUNTAIN NURSING AND REHABILITATION CENTER, and DIVERSICARE MANAGEMENT SERVICES COMPANY,

Cross-Respondents.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Supreme Court of Arkansas erred by holding that the *Gore* factors should be given "equal weight" when this Court has said that the most important indicium of the reasonableness of a punitive damage award is the degree of reprehensibility of the defendant's conduct.

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Cross-Petitioner, Lon C. Sauer, individually, and as administrator of the Estate of Margaretha Sauer (the "Sauer Estate"), conditionally cross-petitions for writ of certiorari to review the judgment of the Supreme Court of Arkansas in this case.

OPINION BELOW

The opinion of the Supreme Court of Arkansas, to be published in S.W.3d, is currently available at 2003 WL 1996087. It is also included in the appendix to the petition for writ of certiorari filed by Advocat, Inc., *et al.*

STATEMENT OF JURISDICTION

The original petition for writ of certiorari filed by Advocat, Inc., *et al.*, was docketed on July 30, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a) and Rule 12.5 of the Rules of the Supreme Court and is conditional upon this Court's grant of Petitioners' petition for writ of certiorari.

CONSTITUTIONAL PROVISION INVOLVED

The due process clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

Factual Background. This case presents one of the more squalid fact situations ever to come before this Court. While in the care of Rich Mountain Nursing and Rehabilitation

Center, Margaretha Sauer was repeatedly left to lie in her own waste for such long periods of time that excrement dried to her skin and brown circles or halos of dried urine formed around her body on the sheets of her bed. She was repeatedly found to have excrement under her fingernails. She developed pressure sores on her buttocks and on her back. She developed blisters between her legs. One record notes that her blisters were bleeding. Some of these sores and blisters were as large as a softball or an adult fist and two or three centimeters deep. These sores and blisters were caused by neglect. As much as five days passed without a change of wound dressings. The sores became infected.

Mrs. Sauer also developed contractures, a painful condition in which the limbs of a person contract and lose their range of motion. Mrs. Sauer had contractures in all four limbs. She was in a fetal position. Both of her arms were drawn up, and her hands were closed. This condition is caused by neglect.

Witnesses testified that Mrs. Sauer "was always thirsty." She told one of her sons that she would probably die hungry. During the last month of her life, she lost 15 pounds without her doctor's being notified. For the last 24 to 48 hours of her life, she was given nothing to eat or drink. Upon her final hospitalization, there was a greenish, foul-smelling discharge from her vagina that had not been noticed or addressed at the nursing home.

Mrs. Sauer died "from severe malnutrition and dehydration." Pet. App. 8a. The nursing home records show that she ate everything that she was offered for breakfast on the last two days of June 1998, yet she was fed little or not at all in July 1998. She died on July 19, 1998. She could have

been hydrated intravenously, but that was not done. According to one expert witness at trial, the failure to provide appropriate nutrition and hydration, which resulted in Mrs. Sauer's death, was an "outrageous deviation from the standard of care." Another expert testified that this conduct was "absolutely below the standard of care. I would call it conscious indifference."

The evidence at trial established that the neglect and ultimate death of Mrs. Sauer were caused by inadequate staffing and inadequate resources at the nursing home. Employees of the nursing home complained on many occasions about inadequate staffing, and they complained about the lack of supplies to care for the residents properly. They were told to quit complaining.

Mark Hemingway, the divisional vice president for the management company, Diversicare Management Services Company, testified that he was aware of the problems with short-staffing at the nursing home and that he discussed these problems with his supervisor, the vice president of operations. Mr. Hemingway attributed the short-staffing to a shift in corporate philosophy beginning in 1996, "when they started talking more about cost-cutting than quality." Prior to this time, Mr. Hemingway could not recall this facility's having any in-house generated bedsores. Mr. Hemingway was fired when he did not reduce staff to meet budget.

Evidence showed that the Petitioners (the "Advocat Defendants") knew that the facility was inadequately staffed and that the Office of Long-Term Care ("OLTC") of the State of Arkansas would take action if this inadequate staffing were discovered. Rather than correct the inadequate staffing, the Advocat Defendants attempted to deceive the OLTC and the

families of residents. During OLTC inspections, the Advocat Defendants brought in employees from other facilities, who disappeared after the inspectors left. They placed uncertified personnel on the floors to create a false appearance that the facility was adequately staffed. They directed employees to falsify charts to make it appear that certified personnel were providing care while they were absent.

All three of the Advocat Defendants participated in the management and direction of this nursing home. Diversicare Leasing Corporation, d/b/a Rich Mountain Nursing and Rehabilitation Center, owned the facility and employed most of the staff. A management agreement provided that Diversicare Management had "full, exclusive control and responsibility of the management of the facility and its operations in all respects." This responsibility, according to the management agreement, included hiring and supervising staff, establishing and maintaining a system of patient care, supervising inventories, and preparing budgets. Diversicare Management prepared policies and procedures manuals to guide the facility. Diversicare Management received a management fee based on a percentage of the facility's revenue. Diversicare Management employed the facility's administrator. Diversicare Management employees instructed the facility's employees to falsify records in order to deceive the OLTC.

Both Diversicare Leasing and Diversicare Management are wholly owned by Advocat, Inc. Advocat, Inc., was paid a fee for "general oversight" of the facility. The budgets were submitted to Advocat, Inc., which instructed the personnel of Diversicare Management or Diversicare Leasing what changes needed to be made in those budgets. Advocat, Inc., implemented a program called "Continuous Quality

Improvement" to direct the quality of care in the nursing home. Yet, the Advocat, Inc., board of directors approved the budget without even considering reports concerning the care of the residents or results of surveys from the OLTC. A bonus system rewarded persons who met Advocat, Inc.'s budget.

Mary Margaret Hamlett, former chief financial officer and member of the board of directors of Advocat, Inc., testified, "I can tell you from the company's perspective these were one. These were operated as if it was one company." Ms. Hamlett stated that, while Diversicare Management and Diversicare Leasing legally were separate entities, they were operated as one nursing home division of the parent company. All of the money collected from the operation of the nursing home at issue was deposited into a regional account in Nashville, Tennessee, and "used to pay bills for the whole company." Mrs. Hamlett testified by video deposition. Her exact testimony was known long before trial. Yet, her testimony was uncontradicted at trial.

Ms. Hamlett also testified, without objection, regarding the extent of the Advocat Defendants' operations. Pet. App. 18a. Still, no evidence was introduced regarding the Advocat Defendants' misconduct in states other than Arkansas or at nursing homes other than the one where Mrs. Sauer resided.

Procedural History. The Sauer Estate's complaint asked for judgment jointly and severally against the Advocat Defendants for both compensatory and punitive damages. In their answer, the Advocat Defendants objected to the determination of the amount of punitive damages based on corporate wealth, and they objected to the determination of the amount of punitive damages without bifurcating the trial.

Before trial, the Sauer Estate filed a motion to bifurcate the trial pursuant to Ark. R. Civ. P. 42(b), which is substantially identical to Fed. R. Civ. P. 42(b). The Sauer Estate asked the court to bifurcate the trial so that financial information pertaining to the Advocat Defendants' net worth and the amount of punitive damages would be introduced at a second phase of the trial, only after the jury had already determined liability and the amount of compensatory damages. Contrary to the position taken in their answer, the Advocat Defendants then objected to bifurcating the trial. The Advocat Defendants also moved *in limine* to exclude evidence of their financial condition. The trial court ruled in favor of the Advocat Defendants on both motions.

Following an eight-day trial, the jury returned verdicts for compensatory damages totaling $15.425 million, as well as verdicts for punitive damages of $21 million against each of the Advocat Defendants. The Advocat Defendants filed a Motion for Judgment Notwithstanding the Verdict and Remittitur or, in the Alternative, for New Trial. They filed with their motion an affidavit of William R. Council, who was then the Advocat Defendants' chief financial officer. He now is their chief executive officer. Attached to Mr. Council's post-trial affidavit was a one-page Subsidiary Balance Sheet Summary as of April 30, 2001, with columns for Diversicare Leasing, Diversicare Management, Advocat on an unconsolidated basis, and Advocat on a consolidated basis. Also attached was a Form 10-Q for the quarterly period ended March 31, 2001, for Advocat, Inc. This 10-Q reported Advocat, Inc.'s financial results on a consolidated basis. The notes to the consolidated financial statement included a two-page discussion of "Insurance Matters" in which the professional liability insurance available to the company and the premiums to be paid for that insurance were discussed.

The Sauer Estate moved to strike the affidavit. The Sauer Estate also filed certificates from the Advocat Defendants' liability insurance carriers and excess insurance carriers showing that the Advocat Defendants had liability coverage, including excess coverage, totaling $95 million to pay the judgments.

The trial court declined to consider the post-trial evidence offered by the Advocat Defendants because that evidence had not been introduced at trial and likewise declined to consider the post-trial evidence offered by the Sauer Estate. Based on the evidence introduced at trial, the trial court reviewed the punitive damage awards in light of each of the three factors articulated in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and concluded that two of the three *Gore* factors had been met in this case. Pet. App. 39a-51a. The trial court declined to order a remittitur or a new trial. Thereafter, the Advocat Defendants' insurers collectively posted supersedeas bonds totaling $86,267,500.

On appeal to the Supreme Court of Arkansas, the Advocat Defendants raised one evidentiary issue,[1] two challenges to the jury instructions, challenges to the sufficiency of the evidence, and arguments that both the compensatory damage awards and the punitive damage awards were excessive. Pet. App. 1a-2a. The Supreme Court of Arkansas found that the one evidentiary challenge was without merit; ruled that no challenge to the jury instructions had been preserved and

1. The evidentiary issue related to the admission of two redacted OLTC surveys showing that the nursing home at issue was understaffed while Mrs. Sauer was a resident. As noted above, no evidence was introduced of alleged misconduct by the Advocat Defendants in other states, so no issue was raised on appeal regarding evidence of misconduct in states other than Arkansas.

that the jury instructions were proper in any event; ruled that the challenges to the sufficiency of the evidence had been waived because the Advocat Defendants failed to renew their motion for a directed verdict at the conclusion of all the evidence; ordered a remittitur of the compensatory damages to $5.425 million[2]; and ordered a remittitur of the punitive damages to $21 million, all to be assessed jointly and severally. Pet. App. 1a-38a. The Supreme Court affirmed the trial court's decision to consider only evidence introduced at trial. Pet. App. 17a. The Advocat Defendants did not file a petition for rehearing as permitted by Rule 2-3 of the Rules of the Supreme Court of Arkansas.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

The Supreme Court of Arkansas Erred In Failing To Recognize That The Most Important Indicium Of The Reasonableness Of Punitive Damages Is The Reprehensibility Of The Conduct And In Failing To Recognize The Weight To Be Given To The Terms Of Imprisonment For The Conduct At Issue.

The Supreme Court of Arkansas stated in its opinion in this case, "[t]hough the Sauer Estate's counsel disputed this at oral argument, we conclude that the three *Gore* criteria must be given equal weight." That statement is contrary to this Court's holding in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996), where this Court stated, "[p]erhaps *the most important indicium* of the reasonableness of a punitive damages award is the degree of reprehensibility of

2. Damages totaling $425,000 were not contested on appeal. Pet. App. 9a, n.2. The court ordered a remittitur of the remaining compensatory damages to $5 million.

the defendant's conduct." (Emphasis added.) That statement in the *Gore* opinion was annotated in footnote 23 with the following quotation: "The flagrancy of the misconduct is thought to be the *primary consideration* in determining the amount of punitive damages." *Id.* at n.23 (emphasis added) (citing Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 Vill. L. Rev. 363, 387 (1994)). That the reprehensibility of the conduct is "the most important indicium of the reasonableness of a punitive damages award" was reiterated in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1521 (2003). The Supreme Court of Arkansas's holding that the three *Gore* factors should be given "equal weight" is contrary to this Court's pronunciations in both *Gore* and *State Farm*.[3]

The misapprehension of the Supreme Court of Arkansas as to the relative weight to be given to the three *Gore* factors led the court to conclude, erroneously, that the punitive damages awards in this case were excessive under the three *Gore* factors.

This case unquestionably presents highly reprehensible behavior. The jury answered separate interrogatories for each defendant and stated that each defendant engaged in conduct that was the proximate cause of the death of Margaretha Sauer. Pet. App. 55a. The jury also answered separate interrogatories finding that each defendant engaged in conduct that warranted punitive damages. Pet. App. 56a. The jury was instructed that it could find that punitive

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3. The Sauer Estate's brief in the Supreme Court of Arkansas quoted the language above from the *Gore* opinion. Supplemental Abstract, Brief, and Supplemental Addendum of Appellee at 38. This was not an argument raised for the first time at oral argument.

damages were warranted only if it found that the defendants knew or should have known, in light of the surrounding circumstances, that their conduct would naturally and probably result in injury and that they continued such conduct with malice or in reckless disregard of the consequences from which malice may be inferred. Hence, the jury found that the Advocat Defendants caused the death of Margaretha Sauer and did so by conduct that showed either malice or reckless indifference to the health and safety of others from which malice may be inferred. The defendants waived their challenge to the sufficiency of the evidence as to the findings by the jury. Pet. App. 15a-16a, 28a-29a. Moreover, the Supreme Court of Arkansas specifically found, upon *de novo* review, "[w]e have no hesitancy in concluding that the reprehensibility of the Appellants' conduct in this case was high." That finding is amply supported by the record, which shows that the defendants were advised by the families of residents, employees, and the Office of Long-Term Care ("OLTC") of the State of Arkansas that the facility had inadequate staff to care for the residents. These warnings were ongoing for at least a year and a half before the death of Mrs. Sauer. Not only did the defendants fail to rectify this dangerous under-staffing, after many warnings that they needed to do so, but they also engaged in "attempts to disguise this fact." Pet. App. 17a. They attempted to conceal their dangerous under-staffing from the OLTC by bringing staff from other facilities to this facility during OLTC surveys, by placing uncertified staff on the floors during OLTC surveys in an effort to make it appear that the facility was adequately staffed when in fact it was not, and by deliberately falsifying records. Pet. App. 21a.

This is not a case like *State Farm*, where the "harm arose from a transaction in the economic realm[.]" 123 S. Ct. at

1524. Here, unlike *State Farm*, the harm arose from physical trauma and physical injury. *Cf. id* at 1525. Mrs. Sauer died "from severe malnutrition and dehydration." Pet. App. 8a. In *Gore*, the harm BMW inflicted "was purely economic in nature." 517 U.S. at 576. In *Gore*, the Court said, "BMW's conduct evinced no indifference to or reckless disregard for the health and safety of others." *Id.* Here, as noted above, the verdict required a finding that the Advocat Defendants' conduct evinced indifference to or reckless disregard for the health and safety of others.

Here, the target of the conduct was vulnerable, which this Court has said is one of the indicia of reprehensibility. *State Farm*, 123 S. Ct. at 1521. Here, the conduct was not an isolated incident. The evidence showed that the under-staffing, which continued through many complaints from employees and families of residents, as well as at least two OLTC reports, was the product of a premeditated and calculated shift in corporate philosophy from emphasizing quality of care to emphasizing becoming the low-cost provider. Moreover, as noted above, the harm here was the product of trickery or deceit. As the Supreme Court of Arkansas correctly held in its opinion, the Advocat Defendants engaged in deliberate efforts to deceive OLTC investigators and others so that their conduct could not be stopped. *Cf. id.* The Supreme Court of Arkansas properly found that the conduct of the Advocat Defendants was highly reprehensible.

After remittitur, the compensatory damages total $5.425 million. The punitive damages awarded by the jury were $21 million for each defendant or $63 million in total. Viewed separately, as the Advocat Defendants argue in their petition for writ of certiorari that they should be, the ratio of punitive

damages to the compensatory damages awarded by the jury is less than 4:1. If the punitive damages awarded by the jury are viewed collectively, the ratio to the remitted compensatory damages is $63 million to $5.425 million or less than 12:1. Either ratio is well within what this Court has deemed reasonable. In *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), this Court upheld a punitive damage award of $10 million in a case in which the compensatory damages were $19,000. The Court did so, in part, because punitive damages should bear a reasonable relationship to the harm likely to result from the defendants' conduct as well as the harm that has actually occurred. *Id.* at 460. *See also Gore*, 517 U.S. at 581. The harm actually caused here was horrendous; it was far worse than the harm caused in *TXO*, which was purely economic. The harm likely to result here is incalculable in economic terms. The defendants' conduct jeopardized the health, safety, and lives of every resident at this nursing home. The harm that was likely to result from the defendants' conduct, as well as the harm that actually occurred, was so far worse than the harm that actually occurred or could have occurred in *TXO*, or in any other case in which this Court has reviewed a punitive damage award, that neither a 4:1 ratio nor a 12:1 ratio of compensatory damages to punitive damages could be deemed excessive.

The remaining *Gore* factor involves comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct. *Gore*, 517 U.S. at 583. Here, the Supreme Court of Arkansas noted that the conduct of the defendants constituted adult abuse, which is punishable under the Arkansas Criminal Code as a Class D felony. A Class D felony is punishable by a fine not to exceed $10,000 and a sentence of imprisonment not to exceed

six years. Ark. Code Ann. § 5-4-201(a)(2) and § 5-4-401(a)(5). As the Supreme Court of Arkansas noted in its opinion, "[i]t is impossible to know how many violations might have occurred." Pet. App. 25a. Considering only the 19 days in July 1998 when Mrs. Sauer was not fed or given water, each meal that she missed and each occasion when she should have been given water but was not could be deemed a separate Class D felony and could have resulted in a separate term of imprisonment. Hence, it is impossible to say that the punitive damages awards by the jury were excessive compared to the criminal penalties that could have been imposed. Even though the Supreme Court of Arkansas noted that, had the Advocat Defendants been found guilty, their conduct would be considered multiple felonies, the court failed to account for the fact that the State of Arkansas would impose terms of imprisonment for those felonies. Hence, the court failed to recognize that the State had given notice of the severity of sanctions that might be imposed for such conduct. While this Court cautioned in *State Farm* that great care must be taken to insure that the civil process is not used to impose criminal penalties, nonetheless, the Court recognized that the existence of a criminal penalty does have a bearing on the seriousness with which a state views a wrongful action. *State Farm*, 123 S. Ct. at 1526. The prospect of terms of imprisonment should have the greatest bearing where the actual harm is not purely economic and not susceptible to precise monetary measurement.

Notwithstanding its recognition that the conduct could be classified as multiple felonies, the Supreme Court of Arkansas held, the "third criterion in *Gore* has not been met." Pet. App. 25a. This third *Gore* factor was the only one that the Supreme Court of Arkansas found not to be met in this case.

The Supreme Court of Arkansas's erroneous statement that the "three *Gore* criteria must be given equal weight" (Pet. App. 20a) ties directly to its decision to order a remittitur of the punitive damages based on its conclusion that the "third criterion in *Gore* has not been met." Had the Supreme Court of Arkansas followed this Court's mandate in *Gore* and in *State Farm* to regard reprehensibility as the most important indicium of the reasonableness of a punitive damages award, it would not have ordered a reduction of the punitive damages in this case. Had the court correctly analyzed the third criterion, it would not have ordered a remittitur of the punitive damages in this case.

CONCLUSION

For the reasons stated in their opposition to the Advocat Defendants' petition for writ of certiorari, the Sauer Estate contends that this Court should not accept this case for review. However, if the Court grants the petition, the Sauer Estate respectfully submits that the Court should review the application of the *Gore* factors *de novo*, correct the mistake made by the Supreme Court of Arkansas in its statement that the three *Gore* factors should be given equal weight, and reinstate the jury verdicts of $21 million in punitive damages for each of the three defendants.

Respectfully submitted,

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ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIP

Cross-Respondent Advocat, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock. Advocat, Inc., is the parent company and sole shareholder of both Cross-Respondent Diversicare Leasing Corporation, d/b/a/ Rich Mountain Nursing and Rehabilitation Center, and Cross-Respondent Diversicare Management Services Company.

Cross-Petitioner Lon C. Sauer is an individual and administrator of the Estate of Margaretha Sauer, deceased.

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STATEMENT OF THE CASE

Petitioners-Cross-Respondents Advocat, Inc., Diversicare Leasing Corporation, and Diversicare Management Services Company ("defendants") respectfully refer the Court to the Statement of Case in their Petition for a Writ of Certiorari, which is incorporated herein by reference. Pursuant to Supreme Court Rule 15.2, a brief in opposition to a petition or cross-petition for a writ of certiorari "should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." U.S. Sup. Ct. R. 15.2. In the Conditional Cross-Petition for a Writ of Certiorari, Cross-Petitioner ("Plaintiff") makes numerous factual misstatements. Plaintiff's misstatements of fact do not relate to the legal issues raised in Plaintiff's cross-petition, which defendants address in the Argument section below. However, given the requirements of Rule 15.2, defendants include the following supplemental statement of the case.

Throughout the cross-petition, Plaintiff incorrectly portrays the three separate defendant corporations, Diversicare Leasing Corporation ("Diversicare Leasing"), Diversicare Management Services Company ("Diversicare Management"), and Advocat, Inc. ("Advocat"), as one and the same. Plaintiff asserts that "[a]ll three of the Advocat Defendants participated in the management and direction" of the Rich Mountain nursing home, where Mrs. Sauer resided. Cross-Pet. at 4.

Plaintiff cannot effect a "merger" of the three defendants by rhetorically substituting the collective term "Advocat Defendants" for the name of each company. Plaintiff does not dispute the fact that the jury that determined the amount of the punitive damages awards was charged to consider each of the three defendants separately. *See* Pet. App. 155a (trial court instructed the jury to decide "each defendant's case separately as if it were a separate lawsuit"). Moreover, in opposing defendants' motion for remittitur, Plaintiff expressly stated to the trial court that Plaintiff "never argued an alter ego theory with respect to any Defendant" but had tried "a case of direct liability against each corporation and the jury was instructed as such." Pet. App. 83a. Plaintiff also denied that it had "asked the jury to pierce the corporate veil and hold Advocat liable for the actions of its subsidiaries." Pet. App. 83a-84a. Furthermore, the trial court recognized that defendants were

separate corporate entities. Pet. at 6 n.3.

The evidence at trial established that the three defendants had vastly different roles. Diversicare Leasing owned and operated the Rich Mountain nursing home. Diversicare Management was involved in the nursing home's daily operations only by virtue of the fact that Rich Mountain's administrator, who was not part of the nursing staff, was an employee of Diversicare Management. No other employee of Diversicare Management participated in the daily operations of the nursing home. All of the individuals at the nursing home who took care of Mrs. Sauer were employees of Diversicare Leasing and were supervised by another Diversicare Leasing employee, the Director of Nursing.

Advocat is a public company whose subsidiaries own and operate nursing homes and other health care facilities across the country. Its subsidiaries include Diversicare Leasing and Diversicare Management. (R. 3681-82) There was no evidence that Advocat participated in the day-to-day operations of the Rich Mountain nursing home. Advocat's Board of Directors approved the budgets for Rich Mountain, along with the budgets of a large number of other nursing homes owned by Advocat subsidiaries across the country. The Advocat board had final budgetary approval for all of the nursing homes only on a consolidated basis. (R. 3665) The Advocat board "did not get into the individual specifics of a particular nursing home," and it did not see the budget for the Rich Mountain nursing home "other than a very summary one-page spread sheet that had all of Arkansas on it, and then each individual nursing home in Arkansas consolidated over in one column." (R. 3665-66) There was no evidence that in the budgeting process the Advocat board received information regarding alleged short-staffing at Rich Mountain. Plaintiff's witness, Mark Hemingway, a former divisional vice-president for Diversicare Management, testified that the budgets were prepared in order to maintain staffing levels that met or exceeded state staffing requirements. (R. 3892-93)

In short, this case was tried below against the defendants as three distinct corporate entities, and the evidence established that the conduct and roles of the defendants differed significantly.

Plaintiff also gives a very one-sided and exaggerated description of the evidence regarding Mrs. Sauer's care at Rich Mountain. Defendants will not rehearse the countervailing evidence regarding Mrs. Sauer's care or point out specific misstatements made by Plaintiff. The details of Mrs. Sauer's care are not relevant to the legal and constitutional issues raised by Plaintiff's cross-petition. Nor does Plaintiff's inflammatory rendition of the evidence regarding Mrs. Sauer's care affect the constitutional issues at the heart of defendants' petition for certiorari.

SUMMARY OF ARGUMENT

Plaintiff's conditional cross-petition seeks to challenge the Arkansas Supreme Court's reduction of the jury's $63 million punitive damages awards to $21 million. Plaintiff claims that the Arkansas Supreme Court's reduction of the punitive damages awards was based upon the court's purportedly erroneous statement that "equal weight" should be given to each of the constitutional guideposts set forth in this Court's decisions in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003).

Plaintiff's cross-petition should be denied because the Arkansas Supreme Court based its reduction of the punitive damages awards on an independent and adequate state law ground. The Arkansas Supreme Court found that as a matter of Arkansas law the $63 million punitive damages awards shocked the conscience of the court and that the awards were excessive as a matter of Arkansas law. The Arkansas Supreme Court also held that the punitive damages awards were grossly excessive as a matter of federal constitutional law. However, given the independent and adequate state law ground for the reduction of the awards that is clearly set forth in the Arkansas Supreme Court's opinion, this Court should decline to review the Arkansas Supreme Court's reduction of the awards. Any opinion rendered by this Court as to the purported error alleged by Plaintiff in the Arkansas Supreme Court's constitutional analysis would constitute an impermissible advisory opinion.

Even if the Arkansas Supreme Court's reduction of the punitive damages awards did not so clearly rest on an independ-

ent and adequate state law ground, the question presented by Plaintiff's cross-petition would not warrant review by this Court. Plaintiff contends that the Arkansas Supreme Court erred in holding that the three *Gore* guideposts should be given "equal weight" and in holding that the third *Gore* guidepost could in itself be a sufficient basis for holding a punitive damages award constitutionally excessive. On the contrary, if any one of the three *Gore* guideposts indicates that an award is grossly disproportionate or that a defendant did not have the constitutionally required fair notice of the severity of the punishment his conduct might incur, the award must, as a matter of due process, be reduced. In this case, the Arkansas Supreme Court's analysis of the civil penalties guidepost correctly led the court to conclude that the defendants had not received fair notice of the severity of the $63 million punitive damages awards. As a constitutional matter, that conclusion mandated the reduction of the award. Moreover, Plaintiff's additional contention that the Arkansas Supreme Court erroneously disregarded the criminal penalties Plaintiff claims would be applicable to the defendants' conduct under Arkansas law is not included in Plaintiff's question presented and does not raise a substantial constitutional question. To the extent the Arkansas Supreme Court found that under the third *Gore* guidepost defendants did not have fair notice that a $63 million sanction could be imposed in this case, the court was correct in reducing the awards.

As shown in the defendants' petition for certiorari and reply brief, the Arkansas Supreme Court did in fact commit constitutional error, including in its application of the third *Gore* guidepost. The Arkansas Supreme Court's constitutional errors, however, implicate only the issue of whether the $21 million punitive damages award must be further reduced to comply with due process. *See* Petition for Certiorari at 7-29; Petitioners' Reply Brief at 1-10.

For these reasons and those set forth below, Plaintiff's conditional cross-petition should be denied.

ARGUMENT

I. PLAINTIFF'S CROSS-PETITION SHOULD BE DENIED BECAUSE THE ARKANSAS SUPREME COURT'S REDUCTION OF THE PUNITIVE DAMAGES AWARDS WAS BASED UPON AN ADEQUATE AND INDEPENDENT STATE LAW GROUND

This Court "from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). As this Court has stated:

> This Court's only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Id.; *see also Coleman v. Thompson*, 501 U.S. 722, 729 (1991) ("This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment."); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 566 (1977) (same).

In the present case, the Arkansas Supreme Court, in a section of its opinion entitled "Arkansas common law," analyzed the $63 million punitive damages awards for excessiveness under Arkansas law. Pet. App. at 16a-18a. The court set forth in detail the Arkansas standards for determining excessiveness of a punitive damages award. *Id.* at 16a. The Arkansas standards detailed by the court do not duplicate the federal constitutional standard, but rather require the court to determine "whether the verdict is so great as to shock the conscience of [the] court or to demonstrate passion or prejudice on the part of the trier of fact." *Id.* The court concluded that the $63 million punitive damages awards "shock[ed] the conscience of [the] court as a civil penalty" and were clearly excessive under Arkansas law. *Id.* at 18a. The Arkansas Supreme Court also independently concluded that the $63 mil-

lion punitive damages awards were excessive under federal constitutional law. Summing up, the court held that both "under Arkansas law and under the three *Gore* factors, $63 million was a grossly excessive award and one that could not have been anticipated by the appellants." *Id.* at 25a.

In short, the Arkansas Supreme Court's opinion makes clear that its reduction of the punitive awards to $21 million is based upon an adequate and independent state law ground. Accordingly, plaintiff's conditional cross-petition challenging that reduction should be denied.

II. PLAINTIFF'S CROSS-PETITION SHOULD BE DENIED BECAUSE THE ARKANSAS SUPREME COURT WAS CORRECT IN HOLDING UNDER THE THIRD *GORE* GUIDEPOST THAT DEFENDANTS DID NOT HAVE FAIR NOTICE OF THE SEVERITY OF THE $63 MILLION PUNITIVE DAMAGES AWARDS

In asserting that the Arkansas Supreme Court erred in stating that the three *Gore* guideposts should be given "equal weight," Plaintiff essentially argues that the reprehensibility guidepost should be allowed to trump the other guideposts. In other words, Plaintiff's contention is that if a defendant's conduct can be portrayed as sufficiently reprehensible, the ratio and civil penalties guideposts may be ignored even if they indicate that the punitive damages award is excessive or that the defendant did not receive fair notice of the severity of the punishment he might face. Plaintiff's view of the relationship of the three guideposts under this Court's punitive damages jurisprudence is simply wrong.

Plaintiff's argument is based on an incorrect interpretation of this Court's statement that the degree of reprehensibility of a defendant's conduct is the "'most important indicium'" of the reasonableness of a punitive damages award. *See Campbell*, 123 S. Ct. at 1521 (quoting *Gore*, 517 U.S. at 575). This Court's decision in *Campbell* makes clear that reprehensibility is the most important guidepost because reprehensibility is a necessary precondition to *any* punitive damages award. Thus, while "[t]he existence of any one of [the] factors" showing reprehensibility "may not be sufficient to sustain a punitive damages award," the "absence of all of them renders *any* award suspect." *Id.* (emphasis added). Moreover, "punitive

damages should *only* be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *Id.* (emphasis added) This Court has not stated or even suggested that the reprehensibility guidepost may trump the other two guideposts or provide a basis for sustaining a punitive damages award that one or both of the other two guideposts indicate is excessive. Rather, to the extent the degree of reprehensibility of a defendant's conduct bears on the *amount* of punitive damages, the reprehensibility guidepost affects whether a higher or lower amount is permissible within the boundaries set by the guideposts of ratio and civil penalties.

The three *Gore* guideposts function together to aid the courts in determining whether a defendant received the constitutionally required "fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Gore*, 517 U.S. at 574. In some cases, all three guideposts in combination may indicate that a punitive damages award is excessive because the defendant lacked fair notice of the size of the award. In other cases, one guidepost may indicate that a defendant lacked fair notice. If even one guidepost compels the conclusion that a defendant lacked fair notice of the size of the punitive award rendered against him, due process requires reduction of the award. Thus, the three guideposts are entitled to equal weight in the sense that even if two appear to support a punitive award, they should not outweigh the third if it indicates that the defendant lacked fair notice or that the award was out of proportion to the harm to the plaintiff. Accordingly, the reprehensibility of a defendant's conduct cannot sustain an award if either or both of the other guideposts show that the award is unconstitutional.

In the present case, the Arkansas Supreme Court's analysis of the third *Gore* guidepost led the court to conclude correctly that defendants did not have the fair notice required by due process that $63 million in punitive damages might be imposed upon them. In applying the third *Gore* guidepost, the Arkansas Supreme Court analyzed the potentially relevant civil penalties provided for by Arkansas law. The court found that the punitive damages award was "substantially greater

than the statutory penalties set forth in the Arkansas Code" for neglect of a patient in a long term care facility, namely "$10,000 for each violation judicially found to have occurred or not more than $50,000 for the death of an adult resulting from a single violation." Pet. App. at 23a. The court noted that the "record in this case does not establish the specific number of civil violations committed against Mrs. Sauer." *Id.* The court also noted criminal sanctions potentially available for criminal neglect of such a patient. *Id.*

In addition, under its analysis of the third *Gore* guidepost, the Arkansas Supreme Court looked to amounts of punitive damages awards that it and the Arkansas Court of Appeals had upheld in earlier cases. The Arkansas Supreme Court stated:

> The highest punitive-damages award affirmed by this court is $3 million. *See Airco, Inc. v. Simmons First Nat. Bank*, 276 Ark. 486, 638 S.W.2d 660 (1982). The highest punitive damage award affirmed by our court of appeals on appeal is $4 million. *See Arrow Int'l, Inc. v. Sparks*, 81 Ark. App. ___, 98 S.W.3d 48 (2003). We conclude, as we did with compensatory damages, that the punitive damages awarded, while not the determinative factor, is instructive. Under our analysis the third criterion in *Gore* has not been met.

Pet. App. at 25a.

Furthermore, contrary to Plaintiffs' contentions, the Arkansas Supreme Court did not err in failing to give more weight to potential criminal penalties – an issue, moreover, that is not included with the question presented in Plaintiff's cross-petition. Plaintiff argues here that "each meal that [Mrs. Sauer] missed and each occasion when she should have been given water but was not could be deemed a separate Class D felony and could have resulted in a separate term of imprisonment." Cross-Petition at 13. Just as it did before the Arkansas Supreme Court, Plaintiff now in its cross-petition entirely fails to support this contention with any authority showing that the Arkansas statute has *ever* been applied in this fashion. Plaintiff's contention that the defendants' conduct toward Mrs. Sauer should be regarded as constituting 6,300 violations is precisely the kind of speculation that this Court rejected in

Campbell as an insufficient basis for upholding a punitive award. *See Campbell*, 123 S. Ct. at 1526 (stating that the "remote possibility of a criminal sanction does not automatically sustain a punitive damages award" and rejecting the Utah Supreme Court's "speculat[ion] about the loss of State Farm's business license, the disgorgement of profits, and possible imprisonment").

Moreover, the cross-petition should be denied even if this Court were to believe that the Arkansas Supreme Court was inaccurate in its statement that the three *Gore* guideposts must be given equal weight. Any such purported error would not change the fact that neither the $63 million punitive awards imposed by the jury in this case nor the remitted $21 million award, imposed jointly and severally on the three defendants, is permissible as a matter of due process. Thus, there was no error in the Arkansas Supreme Court's conclusion that the punitive award needed to be reduced. Rather, as shown in the defendants' petition for certiorari and reply brief, the Arkansas Supreme Court's errors consisted in not reducing the award sufficiently, not giving consideration to the defendants' financial conditions, not applying a separate *Gore* analysis to the conduct of each of the three defendants, and imposing joint and several liability for the punitive award. *See* Petition for Certiorari at 7-29; Petitioners' Reply Brief at 1-10.

Accordingly, the question presented in Plaintiff's cross-petition does not merit review by this Court.

CONCLUSION

Plaintiff's conditional cross-petition for a writ of certiorari should be denied.

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(3) No. 03-353

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IN THE

Supreme Court of the United States

LON C. SAUER, Individually, and as Administrator of the Estate of MARGARETHA SAUER,

Cross-Petitioner,

v.

ADVOCAT, INC., DIVERSICARE LEASING CORPORATION, d/b/a RICH MOUNTAIN NURSING AND REHABILITATION CENTER, and DIVERSICARE MANAGEMENT SERVICES COMPANY,

Cross-Respondents.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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The Advocat Defendants petitioned for a writ of certiorari asking this Court to review the judgment of the Supreme Court of Arkansas to determine whether that court correctly followed *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); yet, now they argue that this Court should not review the one point on which the opinion of the Arkansas court actually misstates the holding in *Gore*. For the reasons stated in its Brief in Opposition in Case No. 03-160, the Sauer Estate submits that this is not a case in which the Court should grant a petition for writ of certiorari. However, if this Court decides to grant a petition for writ of certiorari to review the Arkansas court's application of the *Gore* standards, that review should be thorough; it should be a review to determine whether the Arkansas court correctly followed *Gore*, not a review limited to a search for a way to help the Advocat Defendants.

I. The Decision Of The Supreme Court Of Arkansas As To The Appropriate Amount Of Punitive Damages Is So Interwoven With Federal Law That It Is Not Clear From The Face Of The Opinion That It Rests On Adequate And Independent State Law Grounds.

The Advocat Defendants argue that the decision of the Supreme Court of Arkansas to order a remittitur of the punitive damages from $63 million to $21 million should not be reviewed because the decision was based on an adequate and independent state law ground. That argument is wrong. When a state court decision appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, this Court will conclude that the state court decided the case the way it did because it believed that federal law required it to do so. *Michigan v. Long*, 463 U.S. 1032, 1040-41, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983).

See also Ohio v. Reiner, 532 U.S. 17, 20, 121 S. Ct. 1252, 149 L. Ed. 2d 158 (2001); *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167, 177, 110 S. Ct. 2323, 110 L. Ed. 2d 148 (1990); *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 152, 104 S. Ct. 2267, 81 L. Ed. 2d 113 (1984). Here, the analysis of the Supreme Court of Arkansas as to the appropriate amount of punitive damages rests primarily on the decisions of this Court in *Gore* and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003). That analysis is so interwoven with the decisions of this Court interpreting the due process clause of the Fourteenth Amendment that no adequate and independent state ground is clear from the face of the opinion.

The Supreme Court of Arkansas stated:

> Viewing all of the pertinent evidence together, we conclude that punitive damages were indeed appropriate in this case. The question, however, as was the case with compensatory damages, is the amount of those damages. We conclude that an award of $63 million in punitive damages shocks the conscience of this court as a civil penalty. We will consider what remittitur is appropriate after an analysis under *BMW of North America, Inc. v. Gore*, *supra*.

Pet. App. 18a. Then, in the next several pages of its opinion, the Arkansas court explained and applied the *Gore* factors. Pet. App. 18a-25a. Immediately after its discussion of the *Gore* factors, the court stated:

> We hold that the [trial] court abused its discretion in not granting a new trial due to excessive punitive-

> damages awards or, alternatively, in failing to grant a remittitur. We further hold that under Arkansas law and under the three *Gore* factors, $63 million was a grossly excessive award and one that could not have been anticipated by the appellants. . . . We grant the remittitur and reduce the total of the punitive damages awarded by two-thirds to $21 million, and provide for joint and several liability. We do so on the basis that this is reasonable under our *de novo* review.

Pet. App. 25a.

It is apparent that, as to the amount of the remittitur, the decision of the Arkansas court was guided by that court's analysis of the three *Gore* factors. Although the court mentioned "Arkansas law" in the holding, the entire analysis of "what remittitur is appropriate" was based upon the three *Gore* factors. The opinion contains no discussion of "what remittitur is appropriate" under Arkansas law. The conclusion that the punitive damage verdict of $63 million was "one that could not have been anticipated by the appellants" flows directly from the court's analysis of the third *Gore* factor. No case decided under Arkansas law holds that what could have been anticipated is a relevant consideration in assessing the amount of punitive damages. The holding that the punitive damages verdict of $63 million "could not have been anticipated" by the Advocat Defendants, like the seven-page discussion that preceded it, is based on the Arkansas court's reading of *Gore*. Hence, the state court decision rests primarily on federal law or is interwoven with federal law. The state court decision does not rest on adequate and independent state law grounds.

II. The Supreme Court Of Arkansas Erred In Failing To Recognize That The Most Important Indicium Of The Reasonableness Of Punitive Damages Is The Reprehensibility Of The Conduct And In Failing To Recognize The Weight To Be Given To The Terms Of Imprisonment For The Conduct At Issue.

The Supreme Court of Arkansas stated in its opinion in this case, "[t]hough the Sauer Estate's counsel disputed this at oral argument, we conclude that the three *Gore* criteria must be given equal weight." Pet. App. 20a. That statement is contrary to this Court's holding in *Gore*, where this Court stated, "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore*, 517 U.S. at 575. *Gore* noted that the flagrancy of the misconduct is the "primary consideration in determining the amount of punitive damages." *Id.* at n.23. The opinion of the Arkansas court contradicts the holding in *Gore*.

While the Advocat Defendants pay lip service to the notion that the three *Gore* factors should be considered together, the logic of their argument would reduce the three *Gore* factors to only one, *i.e.*, the disparity between the punitive damages award and other penalties authorized or imposed in comparable cases. On their argument, the whole *Gore* analysis is reduced to a determination of whether the punitive damages award exceeds sanctions imposed in prior cases. When a punitive damages award exceeds previous awards, a defendant can always say that it did not have notice of the sanction that might be imposed. If the Advocat Defendants' argument were to be adopted, no matter how reprehensible the conduct of the defendant, a punitive damage award could never exceed the highest punitive damage award previously affirmed by the state supreme court. Their argument would permit the state courts to take into account the

reprehensibility of the conduct in the decision as to whether to award punitive damages, but, in any case, the amount of the award could never exceed the highest award previously affirmed in that state. Nothing in the opinions of this Court holds or even suggests such a result.

It seems odd that someone would say that he might not have starved an elderly person to death if he had known the amount of punitive damages that might be imposed for such conduct, but in essence that is what the Advocat Defendants say. To some extent, they persuaded the Supreme Court of Arkansas that this Court's holding in *Gore* legitimates such an argument – hence the remittitur of $42 million of the $63 million punitive damages award. BMW could legitimately argue that it would have disclosed that the car sold to Gore had been repainted at a cost of $601.37 [517 U.S. at 564] if it had known the amount of punitive damages that might be awarded for not making that disclosure, but that argument takes on an entirely different character and carries far less weight when advanced by a person liable for neglect and abuse of a vulnerable, helpless person. The vast difference in the reprehensibility of BMW's failing to disclose a $601.37 paint job and the Advocat Defendants' causing Margaretha Sauer's death by "severe malnutrition and dehydration" [Pet. App. 8a] means that BMW's argument cannot simply be transposed into this case. The Arkansas court's legitimization of the Advocat Defendants' argument represents a misreading of *Gore*; and we ask that, if the Court grants certiorari, this issue be considered as a part of a thorough review of the application of the *Gore* factors in this case.

III. The Sauer Estate Did Not Misstate The Facts.

Much of the Advocat Defendants' brief in opposition is devoted to an argument that the Sauer Estate has misstated the facts in its Conditional Cross-Petition For A Writ Of Certiorari. In particular, the Advocat Defendants complain about the description of the three of them as operating one business and participating in the management and direction of the nursing home. The uncontradicted evidence, offered through the deposition testimony of the chief financial officer of the Advocat Defendants, showed that they were operated as one business. Pet. App. 17a-18a. The trial court found that they were operated as one business. Pet. App. 40a-41a. Upon *de novo* review of the record, the Supreme Court of Arkansas, in a unanimous opinion, held that the three were operated as one business. Pet. App. 25a-26a. The Advocat Defendants may disagree with this conclusion (though they offered no evidence to the contrary at trial), but it takes some audacity to say that the Sauer Estate's reiteration of the unanimous finding of every judge who has looked at the record of this case is a misstatement of the facts.

Furthermore, the Supreme Court of Arkansas held that the fact that the three Advocat Defendants were operated as one business was a reason to reduce the punitive damages, not a reason to increase the punitive damages. In ordering a remittitur reducing the total punitive damages award from $63 million to $21 million, the court stated, "[w]e conclude that one business is involved in the management of Rich Mountain and that it shocks the conscience of this court to award the same amount of punitive damages against the parent company and the two subsidiary companies." Pet. App. 25a-26a. The Advocat Defendants are in the peculiar position of attacking the finding of fact stated by the Supreme Court of Arkansas as a basis for reducing the punitive damages award; and they accuse the Sauer Estate of misstatement when it reiterates this finding of fact and the evidence supporting it. If, as they contend, this finding was error, it was an error that favored them.

CONCLUSION

For the reasons stated in their opposition to the Advocat Defendants' petition for writ of certiorari, the Sauer Estate contends that this Court should not accept this case for review. However, if the Court grants the petition, the Sauer Estate respectfully submits that the Court should review in its entirety the application of the *Gore* factors by the Supreme Court of Arkansas; correct the error of the Supreme Court of Arkansas in holding that the three *Gore* factors should be given equal weight; and reinstate the jury verdicts of $21 million in punitive damages for each of the three defendants.

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